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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

EASTER HOUSE, an Illinois Not-For-Profit Corporation,

Petitioner,

v.

THOMAS FELDER, FLORENCE McGUIRE and JOAN SATOLOE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Whether the Seventh Circuit's decision upon remand is directly inconsistent with this Court's decision in *Zinermon v. Burch*, misapprehends the scope of the decision, distorts its rationale, and denigrates the precedential impact of the principles upon which that decision was based.

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OPINIONS BELOW

The District Court for the Northern District of Illinois entered judgment upon the jury verdict in this case on June 18, 1986. The Seventh Circuit affirmed the judgment, 852 F.2d 901 (7th Cir. 1988), but thereafter reheard the case *en banc* and reversed. 879 F.2d 1454 (7th Cir. 1989) (*en banc*). This Court, on March 5, 1990, entered an order, ___ U.S. ___, 110 S. Ct. 1314 (1990), wherein it granted certiorari, vacated the Seventh Circuit's *en banc* decision

and remanded the case in light of *Zinermon v. Burch*, ____ U.S. ____, 110 S. Ct. 975 (1990). On remand from this Court, the Seventh Circuit again sitting *en banc*, sustained its prior *en banc* decision and reversed the judgment of the District Court. 910 F.2d 1387.

JURISDICTION

The petitioner invoked federal jurisdiction under 28 U.S.C. §1331 in the United States District Court for the Northern District of Illinois, Eastern Division. On August 14, 1990, upon remand from this Court, the Seventh Circuit, sitting *en banc*, reversed the jury's verdict. This Court's jurisdiction to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Sections 8 and 9 of Child Care Act of 1969;
Ill. Rev. Stat. Ch. 23, §§2218 and 2219:

§2218. Revocation or Refusal to renew licenses—Grounds. §8. The Department may revoke or refuse to renew the license of any child care facility or refuse to issue full license to the holder of a permit should the licensee or holder of a permit:

(1) consistently fail to maintain standards prescribed and published by the Department;

(2) substantially violate any of the provisions of the license issued;

(3) furnish or make any misleading or false statement or report to the Department;

(4) refuse to submit to the Department any reports or refuse to make available to the Department any records required by the Department in making investigation of the facility for licensing purposes;

(5) fail or refuse to submit to an investigation by the Department;

(6) fail or refuse to admit authorized representatives of the Department at any reasonable time for the purposes of investigation;

(7) fail to provide, maintain, equip and keep in safe and sanitary condition premises established or used for child care as required under standards prescribed by the Department or, as otherwise required by any law, regulation or ordinance applicable to the location of such facility;

(8) refuse to display its license or permit; or

(9) fail to maintain financial resources adequate for the satisfactory care of children served in regard to upkeep of premises, and provisions for personal care, medical services, clothing, education and other essentials in the proper care, rearing and training of children.

§2219. Proceedings to revoke or to refuse renewal of licenses—Notice. §9. Prior to revocation or refusal to renew a license, the Department shall notify the licensee by registered mail with postage prepaid, at the address specified on the license, or at the address of the ranking or presiding officer of a board of directors, or any equivalent body conducting a child care facility, of the contemplated action and that the licensee may, within 10 days of such notification, dating from the postmark of the registered mail, request in writing a public hearing before the Department, and, at the same time, may request a written statement of charges from the Department.

Statement of charges—Notice of hearing—Service

(a) Upon written request by the licensee, the Department shall furnish such written statement of charges, and, at the same time, shall set the date and place for the hearing. The charges and notice of the hearing shall be delivered by registered mail with postage prepaid, and the hearing must be held within 30 days, dating from the date of the postmark of the registered mail, except that notification must be made at least 15 days in advance of the date set for the hearing.

Findings—Order

(b) If no request for a hearing is made within 10 days after notification, or if the Department determines, upon holding a hearing that the license should be revoked or renewal denied, then the license shall be revoked or renewal denied. When the Department expressly finds that the continued operation of a child care facility violates any minimum standard prescribed by the Department, as authorized by this Act, or otherwise jeopardizes the health, safety, morals or welfare of children served by the facility, the Department shall include in its order revoking or refusing

to renew the license an order of closure directing that the operation of the facility terminate immediately. In this event, the facility may not operate during the pendency of any proceeding for the judicial review of the decision of the Department revoking or refusing to renew the license, except under court order.

Oaths—Subpoenas—Witnesses

(c) Upon the hearing of proceedings in which the license is revoked, renewal of license is refused or full license is denied, the Director of the Department, or any officer or employee duly authorized by him in writing, may administer oaths and the Department may procure, by its subpoena, the attendance of witnesses and the production of relevant books and papers.

Hearing—Continuance

(d) At the time and place designated, the Director of the Department or the officer or employee authorized by him in writing, shall hear the charges, and both the Department and the licensee shall be allowed to present in person or by counsel such statements, testimony and evidence as may be pertinent to the charges or to the defense thereto. The hearing officer may continue such hearing from time to time, but not to exceed a single period of 30 days, unless special extenuating circumstances make further continuance feasible.

STATEMENT OF THE CASE

I. INTRODUCTION

This case arose out of an abuse of governmental power by state licensing officials who possessed the state delegated power and authority to revoke and to refuse to renew licenses of child welfare agencies in Cook County, Illinois. These very same officials also were charged with the authority and duty to provide the licensee with notice and an opportunity to be heard before any such action and to initiate pre-revocation hearings. After a jury trial involving the testimony of 11 witnesses and over 200 exhibits, the jury found that the state official defendants, together with a private defendant, had abused their authority by conspiring to deprive Easter House of its property, including its license to operate as a child welfare agency, without any prior notice or opportunity to be heard in violation of the procedural due process guarantees of the Fourteenth Amendment.[1]

II. THE PARTIES

Easter House, an Illinois not-for-profit corporation,[2] is a licensed child welfare agency engaged primarily in providing adoption services. Thomas Felder was the top state official for the Illinois Department of Children and Family

[1] The jury also found for Easter House on Count II of its complaint that the state official defendants conspired to conduct an unfounded investigation of Easter House in 1976-1977. The Seventh Circuit reversed the judgment on Count II. This Petition for Certiorari concerns Count I only; it does not relate to Count II.

[2] Easter House is not the parent, subsidiary or affiliate of any other entity.

Services ("DCFS") in Cook County during the relevant period, late 1974 and early 1975. As Chief Administrator of this region, Felder directed and was responsible for a vast array of services, but his major responsibility was the licensing of child welfare agencies. Specifically, Felder possessed the state-delegated power and final decision-making authority to both refuse to renew or to revoke child welfare agency licenses in his region and to afford such licensees notice and an opportunity to contest his decision in the form of a pre-revocation hearing. Also, even though DCFS had an enforcement manual which prescribed certain steps licensing officials were to follow prior to taking action to revoke or to refuse to renew a license, Felder had the broad authority to bypass and ignore this procedure whenever he, in his discretion, deemed appropriate. Felder's staff, included the other state official defendants, Florence McGuire, a licensing supervisor, and Joan Satoloe, a licensing representative (sometimes referred collectively as the "state officials" or "state official defendants").

III. THE CONSPIRACY

In late 1974 and early 1975, Felder, McGuire and Satoloe conspired with Millicent Smith, the then-executive director of Easter House, to transfer all of the business and property of Easter House from its rightful owner to Smith. The conspiracy was implemented through a two-part plan. The first part was to quickly deprive Easter House of its license and thereby to effectively destroy its business, at least for a period of time. The second part of the plan was to simultaneously and quickly license and establish Smith's Easter House as a new, for-profit corporation with Smith at the helm.

IV. THE ORIGIN AND IMPLEMENTATION OF THE CONSPIRACY AMONG THE STATE OFFICIALS AND SMITH

The child welfare agency license for Easter House was subject to renewal on December 1, 1974. As part of the renewal process, Satoloe, DCFS licensing representative for Easter House, conducted a license study of Easter House. Upon the completion of her study, Satoloe issued a recommendation that Easter House's license be renewed for the customary two-year period commencing December 1, 1974. Easter House's renewed license was then issued and signed.

Shortly after the renewal of Easter House's license, the conspiracy among Smith and the state officials took shape. Smith decided to leave Easter House to form her own adoption agency. Smith believed that she and the name "Easter House" were synonymous and she told this to the state officials. Smith also informed Felder, McGuire and Satoloe that it was her intention to take the business and goodwill of Easter House to her new agency. To accomplish those objectives, Smith needed the knowing assistance and active participation of the state officials possessing the licensing power of the state.

On December 30, 1974, Smith met with McGuire at the DCFS offices. McGuire prepared a memorandum of that meeting and distributed it to Felder on that day and to Satoloe upon her return from vacation a few days later. Among the matters discussed between Smith and McGuire on December 30th were: that Smith had secretly removed all of the active files from Easter House's offices to her new offices without the knowledge of the Chairman of the Board of Easter House and hoped to complete the removal of all of the files before he returned from vacation; that Smith planned to operate her new agency under

the same name, Easter House; that Smith was trying to use the same phone number for her new agency that had been used for the old Easter House; that Smith would try to direct the mail of the old Easter House to her new office; and that Smith was essentially going to be operating her new agency as the old Easter House. Smith sent letters to McGuire, Satoloe and Felder the following day thanking them for their assistance, including their heeding the request to withhold the license for Easter House.

The major step in the plan was to deprive Easter House of its license and effectively put it out of business for at least long enough to allow Smith the opportunity to get her agency started. Felder, McGuire and Satoloe met and, having full knowledge of Smith's actions and intentions and in furtherance of their plan, decided to refuse to renew the license of Easter House. On January 6, 1975, Felder sent a certified letter to Easter House refusing to renew its license. The letter officially informed Easter House that it was no longer licensed and that if it wanted to engage in any adoption program, it would have to reapply for a new license. Easter House was not given any notice or opportunity to be heard prior to this action.[3]

Neither exigent circumstances nor an emergency situation was the basis for Felder's swift action against Easter House. Under Illinois law, Felder had the power to revoke an agency's license if he determined that it "consistently fail(s) to maintain standards." *See*: *Ill. Rev. Stat.* ch. 23, §2218(1). While Felder based his action on that statutory ground, Felder admitted that he did not consider

[3] The Illinois Child Care Act required that an agency receive notice and a hearing *before* DCFS refused to renew or revoke an agency's license. *Ill. Rev. Stat.* Ch. 23, §2219.

whether Easter House had "consistently" failed to maintain standards. No definition or explanation of that term is provided by the State. Felder also conceded that he decided to disregard the defendants' enforcement manual, which he had the discretion to do.

Although, on January 8, 1975, Felder sent a second letter to Easter House advising Easter House that it had ten days to seek a hearing to review his refusal to renew its license, by that time, as Felder conceded, Easter House had already been officially delicensed. The state officials admitted that the decision and letter of January 6, 1975 terminated Easter House's licensed status.

After the January, 1975 letters, and before Easter House had even received the letters, the state officials took further action to publish the deprivation of Easter Houses' license to ensure that the community knew that it was no longer licensed. For example, an attorney called DCFS asking about the status of Easter House on behalf of his clients who were interested in an adoption and was told that his clients should not make any commitments because Easter House was not licensed. Also, on January 10, 1975, Felder contacted Judge Comerford, the Chief Judge in charge of adoptions in Cook County, and notified him in writing that Easter House was no longer licensed.

The state officials also used their deprivation of Easter House's license to sabotage Easter House in its efforts to find a new Executive Director and become relicensed. After terminating Easter House's license, the state officials received an inquiry from a qualified applicant seeking the position of Easter House's Executive Director. He was told that Easter House had no license.

The sudden deprivation of Easter House's license by the state officials, coupled with Smith's actions, including the

removal of all of its active files, virtually shut down the agency. Without a license, Easter House could not perform its primary function of placing children for adoption. Having fulfilled the first part of this conspiracy—depriving Easter House of its license and ability to function—the state officials, together with Smith, carried out the second part which was to make Smith's new agency operational as quickly as possible. So swiftly did the state officials act on the second objective of this conspiracy that they actually recommended that Smith's agency be licensed long before they completed their standard license study. Additionally, many of the interviews contained in the license and charter studies were fabricated. Also, the state licensing requirement that operators of a child welfare agency be reputable, went virtually ignored in Smith's case. The state officials recommended that Smith be licensed even though they were fully aware that she had stolen all of Easter House's active files and intended to use them in her new agency; she had attempted to direct Easter House's mail to her new agency; she had attempted to reassign Easter House's phone number to her new agency; she was planning to use the Easter House name as the name for her new agency despite the confusion this would generate among the public; and she had unlawfully placed a child for adoption before she was licensed and lied to the state officials about the incident.

Ultimately, after Smith was licensed, established and operating her new agency using the name "Easter House," the petitioner, Easter House was finally given its renewed license. Thus, over the course of two and one half months, the state officials, through coordinated action with Smith, had transferred all of the business and property of Easter House from its rightful owner to Smith.

The jury found that the state officials conspired with Smith under color of law to deprive Easter House of its property without due process of law and that each of the state officials and Smith acted with malice. The jury awarded Easter House $150,000 as compensatory damages and assessed punitive damages in the amounts of $5,000 against Felder, $5,000 against McGuire, and $5,000 against Satoloe and $25,000 against Smith.

REASONS FOR GRANTING THE WRIT

THE SEVENTH CIRCUIT'S DECISION UPON REMAND IS DIRECTLY INCONSISTENT WITH THIS COURT'S DECISION IN *ZINERMON v. BURCH*, MISAPPREHENDS THE SCOPE OF THE DECISION, DISTORTS ITS RATIONALE, AND DENIGRATES THE PRECEDENTIAL IMPACT OF THE PRINCIPLES UPON WHICH THAT DECISION WAS BASED.

This petition seeks to remedy a serious constitutional wrong. The single legal issue presented in this case was resolved clearly, directly, and favorably to petitioner's legal position by this Court in *Zinermon v. Burch*, ____ U.S. ____, 110 S. Ct. 975 (1990). Indeed, this Court granted certiorari in this very case one week after rendering the *Zinermon* opinion, vacated the Seventh Circuit's *en banc* opinion and remanded the case for further consideration in light of *Zinermon*. Yet, upon remand, the Seventh Circuit stubbornly rendered another *en banc* opinion which conflicts with the Supreme Court's decision in *Zinermon* and, which, for the most part, merely reiterates its vacated decision on the same legal issue. The Seventh Circuit's *en banc* opinion shows little respect for *Zinermon*

and attempts to demean its significance. The concurring opinion goes so far as to characterize this Court's decision as another step in a "line of precedent already resembling the path of a drunken sailor." *Easter House v. Felder*, 910 F.2d 1387, 1409 (7th Cir. *en banc*) (Easterbrook, J., concurring). The Seventh Circuit fails, or refuses, to apply the clear dictates of *Zinermon* to this case. The Seventh Circuit's decision is an affront to the authority of this Court. The only recourse petitioner has is to petition yet again for a Writ of Certiorari.

This Court granted certiorari in the *Zinermon* case for the express purpose of resolving a recurring constitutional issue concerning the scope and applicability of *Parratt v. Taylor*, 451 U.S. 527 (1981), and *Hudson v. Palmer*, 468 U.S. 517 (1984). That issue focused on whether *Parratt* applied to deprivations effected by the very officials charged with providing predeprivation process. Before *Zinermon*, a serious conflict had arisen among the circuits concerning the scope of *Parratt* and *Hudson*. *Parratt* and its progeny stand for the principle that a deprivation of a constitutionally protected property interest, without any prior notice or hearing, caused by a state employee's random and unauthorized conduct does not give rise to a §1983 procedural due process claim, unless the state fails to provide an adequate post-deprivation remedy. The issue which had created the conflict among the circuits, and which is at the heart of both the *Zinermon* and *Easter House* decisions, concerned the meaning and scope of the term "random and unauthorized."

Two distinctly different views of the scope and meaning of *Parratt* and its progeny had emerged. The majority of the circuits adopted a narrow interpretation of the term "random and unauthorized." Those courts held that *Parratt* did not apply where the state officials who had

caused the deprivation possessed the state-delegated authority to effect the deprivation and the power and duty to provide the plaintiff with notice and a hearing before the deprivation. Where such a circumstance existed, those courts found that the conduct was not "unauthorized." Thus, predeprivation process was required, and the state officials' abuse of power could subject them to §1983 liability even if their conduct had violated state statutes or procedures. *See, e.g., Freeman v. Blair*, 793 F.2d 166, 177 (8th Cir. 1986); *Patterson v. Coughlin*, 761 F.2d 86, 891-893 (2nd Cir. 1985); *Bretz v. Kelman*, 773 F.2d 1026, 1031 (9th Cir. 1985) (*en banc*).

A diametrically opposite and minority view applied *Parratt* broadly. Those courts held that if the State's statutory scheme and established practices and procedures required sufficient predeprivation process, then *Parratt* applied. Under that view, *Parratt* even barred claims for deprivations caused by the very state officials possessing the power to cause a deprivation and charged with the authority to provide predeprivation process. *See, e.g., Holloway v. Walker*, 784 F.2d 1287, 1292-1293 (5th Cir. 1986); *Yates v. Jamieson*, 782 F.2d 1182-1185 (4th Cir. 1986).

The Seventh Circuit had been struggling within itself over whether *Parratt* ought to be applied narrowly or broadly. *See*: *Tavarez v. O'Malley*, 826 F.2d 671 (7th Cir. 1987) (recognizing that *Parratt* may be read narrowly or broadly), *Wilson v. Civil Town of Clayton*, 839 F.2d 375 (7th Cir. 1988) (applying *Parratt* narrowly); *Toney-El v. Franzen*, 777 F.2d 1224 (7th Cir. 1985) (applying *Parratt* broadly). The *Easter House* case presented a clean, factual circumstance for the Seventh Circuit to address the scope of *Parratt* and its progeny. After an extensive jury trial, Easter House obtained a judgment against certain state officials who had deprived Easter House of its prop-

erty without any predeprivation process. The Seventh Circuit, in a split panel decision, affirmed that judgment interpreting *Parratt* narrowly and finding that it did not apply to this case. The dissent, authored by Judge Kanne, who has also authored both *en banc* decisions in this case, advocated a broad view of *Parratt* and wanted to reverse. The defendant state officials moved for rehearing with the suggestion for rehearing *en banc*. The Seventh Circuit granted the petition for rehearing *en banc* and reversed the district court judgment in favor of Easter House.

That first *en banc* opinion, which was later vacated by this Court, adopted a broad interpretation of *Parratt* directly aligning the Seventh Circuit with the minority view as earlier expressed by the Fifth Circuit in *Holloway v. Walker*, *supra*. The first *en banc* decision held that where the state legislature has enacted statutes which require state officials to provide adequate predeprivation process, then any conduct by a state official which deprives a person of his property without providing such predeprivation process is "random and unauthorized" and protects that state official from §1983 liability regardless of whether the state official is clothed with the state's authority to effect the deprivation and to initiate and implement such predeprivation process.

At the time Easter House filed its first Petition for Certiorari, this Court was already considering the scope of *Parratt* in connection with its review of the *Zinermon* case. Easter House filed its Petition for Certiorari in October 1989. The Court decided *Zinermon* on February 27, 1990 and on March 5, 1990, this Court granted Easter House's Petition for Certiorari, vacated the Seventh Circuit's *en banc* decision, and remanded the case for further consideration in light of *Zinermon*.

The decision in *Zinermon* was intended by this Court to resolve the conflict which had emerged among the circuits on the very issue upon which the Seventh Circuit based its original *en banc* decision. As this Court stated:

> This Court granted certiorari to resolve the conflict—so evident in the divided views of the judges of the Eleventh Circuit—that has arisen in the Courts of Appeals over the proper scope of the *Parratt* rule. ____ U.S. ____, 110 S. Ct. at 978 (1990).

The footnote to that sentence of the Court's opinion concisely explains the conflict which had emerged among the circuits and which *Zinermon* resolved.

> Several Courts of Appeals have found *Parratt* inapplicable where the defendant state officials had the state-clothed authority to effect a deprivation, and had the power to provide the plaintiff with a hearing before they did so (citations omitted).
>
> Other Courts of Appeals have held that *Parratt* applies even to deprivations effected by the very state officials charged with providing predeprivation process (citations omitted).
>
> . . .
>
> 110 S. Ct. at 978, fn. 2.

The original *en banc* decision in this case unequivocally aligned the Seventh Circuit with the broad interpretation of *Parratt* which is described in the second paragraph of that footnote. Indeed, the case primarily relied upon by the Seventh Circuit in its first *en banc* decision, *Holloway v. Walker, supra*, is cited among those cases in the second paragraph in the Court's footnote. The Court decided not to follow that broad interpretation of *Parratt*.

The majority in *Zinermon* clearly embraces a narrow reading of *Parratt* and its progeny. The Court began its analysis in *Zinermon* with a discussion of *Monroe v. Pape*, 365 U.S. 167 (1961), stating:

> To understand the background against which this question arises, we return to the interpretation of §1983 articulated in *Monroe v. Pape* (citation omitted). In *Monroe*, this Court rejected the view that §1983 applies only to violations of constitutional rights that are authorized by state law, and does not reach abuses of state authority that are forbidden by the state's statutes or constitution, or are torts under the state's common law. *Zinermon*, *supra*, 110 S. Ct. at 982.

The Court also observed:

> . . . as was noted in *Monroe*, in many cases, there is 'no quarrel with the state law on the books,' (citation omitted); instead, the problem is the way those laws are or are not implemented by state officials. *Id.* 110 S. Ct. at 983.

The Court thus recognized that the State acts not only through its legislature, but also through its officials to whom the State has delegated its power to act and to implement its laws. With the concepts articulated in *Monroe v. Pape*, *supra*, as its foundation, the Court analyzed and explained the meaning of the terms "random and unauthorized" as used in *Parratt* and its progeny.

The Court emphasized that the Constitution normally requires notice and some kind of a hearing *before* the State deprives a person of liberty or property. The Court noted that only in certain limited circumstances will a post-deprivation remedy satisfy due process and that such circumstances are the exception rather than the rule. *Parratt* and its progeny represent one of the *limited* exceptions to that constitutional norm.

The Court applied those principles to the facts in *Zinermon* and identified three basic reasons why *Parratt* and its progeny did not apply. The first two basic reasons focused on the predictability of the deprivation of Burch's

liberty and the possibility that additional predeprivation safeguards could have prevented the erroneous deprivation.

Finally, and most significantly here, the Court defined the term "unauthorized" as it is used in *Parratt* and its progeny. The third basic reason that the Court concluded that *Parratt* and its progeny did not apply to the conduct by the state officials in *Zinermon* was that their conduct could not be characterized as "unauthorized" in the sense that term is used in *Parratt*. The Court explained:

> Third, petitioners cannot characterize their conduct as "unauthorized" in the sense the term is used in *Parratt* and *Hudson*. The State delegated to them the power and authority to effect the very deprivation complained of here, Burch's confinement in a mental hospital, and also delegated to them the concomitant duty to initiate the procedural safeguards set up by state law to guard against unlawful confinement. In *Parratt* and *Hudson*, the state employees had no similar broad authority to deprive prisoners of their personal property, and no similar duty to initiate (for persons unable to protect their own interests) the procedural safeguards required before deprivations occur. The deprivation here is "unauthorized" only in the sense that it was not an act sanctioned by state law, but, instead, was a "depriv[ation] of constitutional rights . . . by an official's abuse of his position." *Monroe*, 365 U.S. at 172.

Id. at 990.

In the footnote at the end of that quoted paragraph, the majority again expresses its view that *Parratt* and its progeny are exceptions to the normal requirement of predeprivation process and ought to be construed narrowly. The Court explains that state officials cannot escape §1983 liability merely because they departed from established state procedures or practices. The Court stated:

> Contrary to the dissent's view of *Parratt* and *Hudson*, those cases do not stand for the proposition that in every case where a deprivation is caused by an 'unauthorized . . . departure from established practices,' *post* at 991, state officials can escape §1983 liability simply because the State provides tort remedies. This reading of *Parratt* and *Hudson* detaches those cases from their proper role as special applications of the settled principles expressed in *Monroe* and *Matthews*. *Id.*, fn. 20. *Id.* 110 S. Ct. 990, fn. 20.

The Seventh Circuit's second *en banc* opinion, which is the subject of this petition, discloses that the Seventh Circuit, in essence, disagrees with the majority opinion in *Zinermon* and has failed, or refused, to apply the holding and rationale of *Zinermon* to this case. Upon remand from this Court for further consideration in light of *Zinermon*, the Seventh Circuit again held that Easter House's §1983 claim against the state officials was barred under *Parratt* and its progeny.

The Seventh Circuit's opinion on remand is directly inconsistent with the principles expressed in the majority opinion in *Zinermon*. The only issue upon which the Seventh Circuit based its first *en banc* reversal of the judgment in favor of Easter House was that the claim was barred by *Parratt* and its progeny. That is the very same conclusion that the Seventh Circuit reached in its second *en banc* decision. The Seventh Circuit did not identify any new or different legal or factual issue to justify their reversal of the district court judgment; it only "modif[ies] our original *en banc* opinion to account for the Court's pronouncements in *Zinermon*, but reaffirm[s] our previous disposition of these issues." *Easter House*, *supra*, 910 F.2d at 988. The majority opinion provides precious little more analysis of the *Parratt* issue than did its first *en banc* opinion. The Seventh Circuit merely attempts to distinguish *Zinermon* and strictly limit the impact of that case to its par-

ticular facts. The Seventh Circuit ignores the plain precedential impact of *Zinermon* and instead attempts to distort the rationale of *Zinermon* in a way to conform to the views the Seventh Circuit had held before *Zinermon*.

The Seventh Circuit still focuses *only* on the adequacy of the state statutory scheme. In effect, the Seventh Circuit's majority opinion states that the problem in *Zinermon* was that the state statutory scheme was inadequate and that if the state statutes had provided, in theory, sufficient predeprivation procedural safeguards, *Parratt* would apply even if the state officials possessing the power to cause the deprivation and charged with the duty to initiate and implement the procedural safeguards had failed to do so.

> Thus, as the Supreme Court found, the statute gave the officials at the mental health facility broad discretion in admitting patients under the provisions of the statutory scheme, but did not provide for procedural safeguards necessary to protect against any potential abuse of that discretion. ___ U.S. at ____, 110 S. Ct. at 988. Based on this statutory oversight, the majority concluded that *Parratt* was inapplicable.

The Seventh Circuit completely ignores the Supreme Court's discussion of *Monroe v. Pape*, *supra*, and its focus on the abuse of power by state officials. As observed in *Zinermon* and *Monroe*, often " 'there is no quarrel with the state law on the books'; instead, the problem is the way those laws are or are not implemented." *Zinermon*, *supra*, 110 S. Ct. at 983. Yet, the *en banc* majority in *Easter House* stubbornly adheres to the view expressed in the dissent in *Zinermon* and which was expressly rejected by the majority in *Zinermon*: that state officials can escape §1983 liability as long as the state statutory scheme is constitutionally adequate and the state officials can claim that their conduct violated established state practices or statutes.

Moreover, the *en banc* majority opinion fails to recognize that the statutory scheme in *Easter House*, as in *Zinermon*, results in a broad delegation of relatively uncircumscribed power to the state officials. In both *Zinermon* and *Easter House*, if the state officials had conformed their behavior to the state statutory scheme, no deprivation and no constitutional violation would have occurred. In *Easter House*, the applicable statute identified the grounds for which a license could be revoked. The statutory grounds for the action against Easter House were that it purportedly "consistently fail[ed] to maintain standards prescribed and published by the Department." No definition or explanation of "consistently failed" is provided anywhere in the state statutory scheme; instead, that determination is delegated to the state officials. The same state officials were also delegated the responsibility to provide the licensee with notice and a hearing before revoking the license. The Department had also adopted an Enforcement Manual which detailed numerous predeprivation procedures designed to help the licensee and avoid an arbitrary revocation. However, the State also delegated to the same state official defendants the discretionary power to choose not to follow such steps in any particular case. While certainly the state official defendants violated state law, they were easily able to cause the wrongful deprivation because of the broad delegation of discretionary power to Felder and his staff, without any meaningful checks on that power. The state officials who effected the deprivations without any predeprivation process were the very state officials charged with providing predeprivation process. Thus, the Seventh Circuit's decision directly conflicts with *Zinermon* even when viewed from the most limited precedential perspective.

Another major element which must exist before *Parratt* applies is that the state officials' conduct must be "unauthorized." While the Seventh Circuit does not accord

much weight to the issue of whether the state officials' conduct is "unauthorized," they grudgingly seem to acknowledge that there must be such a finding for *Parratt* to apply. Referring to the majority opinion in *Zinermon*, the Seventh Circuit stated:

> Finally, the Court concluded that the actions of the doctors could not be characterized as "unauthorized" in light of the authority they were given to effect the very deprivation complained of by the plaintiff. *Easter House, supra,* 910 F.2d at 1401.

However, the *en banc* majority's holding that the state officials' conduct was "unauthorized" in *Easter House*, is totally inconsistent with the definition of that term in *Zinermon* and *Parratt*. The Seventh Circuit stated:

> Although certain DCFS officials did have the authority to deny renewal applications *after holding a formal hearing*, those same DCFS officials did not have the duty to initiate those predeprivation safeguards. Rather, the responsibility to initiate the procedural safeguards rested with the party aggrieved by the preliminary DCFS decision—in this case, Easter House. Thus, although the deprivation alleged did arguably occur at the hands of a 'high-ranking official', it is clear that it was not the result of that official's 'abuse of . . . broadly delegated, uncircumscribed power to effect the deprivation at issue'. ____ U.S. ____, 110 S. Ct. at 989. Thus, we cannot conclude that the deprivation was 'authorized.' *Id.* at 1402. (Emphasis in original.)

While that distinction is difficult to even understand, the Seventh Circuit apparently believes that the victim, i.e., the citizen whose property has been taken away by the state official's abuse of his power, has the responsibility to initiate the predeprivation process. As applied to this case, the suggestion that Easter House should have initiated the predeprivation process which the state was

constitutionally required to provide does not make *any* sense.

Easter House was deprived of its license before it received any notice or any opportunity to be heard. The same state officials who revoked Easter House's license and failed to give Easter House any predeprivation process also took action to give further effect to that deprivation by advising job applicants, prospective adoptive parents and the Chief Judge dealing with adoptions that Easter House was no longer licensed and was unable to make adoption placements. All of such conduct, which effectively deprived Easter House of its license and its right to operate as a licensed child welfare agency, was done *before* Easter House had even been informed of the action by the state officials. Easter House obviously was not vested with the power to, or capable of, initiating or implementing the requisite predeprivation process.[4]

The state official defendants possessed the broadly delegated state power to refuse to renew or revoke licenses in the region in which Easter House was located, and those same officials had the power and the duty to initiate and implement the constitutionally required predeprivation safeguards. As in *Zinermon*, the state delegated to them the power and authority to effect the very deprivation complained of and also delegated to them the concomitant duty to initiate the procedural safeguards to guard against an erroneous deprivation. The deprivation

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[4] Significantly, the Seventh Circuit did not try to justify their first *en banc* decision by such a convoluted, illogical disposition of the "unauthorized" element of *Parratt*. Indeed, the first *en banc* decision implicitly acknowledged that the defendant state officials were high-ranking state officials who had the authority to provide the due process protections which the State had put in place.

here, like in *Zinermon*, was "unauthorized" only in the sense that it was not an act sanctioned by state law, but instead, was a deprivation of a constitutional right by an official's abuse of his delegated power. Respectfully, petitioners submit that the majority opinion by the Seventh Circuit completely misses the mark on whether the state officials' conduct was "unauthorized" and defies the clear dictates of *Zinermon*.

This Court does not lightly grant petitions for certiorari, vacate *en banc* decisions of circuit courts, and remand for further consideration in light of its decision in a particular case. In *Henry v. City of Rock Hill*, 376 U.S. 776 (1964), this Court granted certiorari, vacated a judgment of the Supreme Court of South Carolina and remanded the case for further consideration in light of its decision in *Edwards v. South Carolina*, 372 U.S. 229 (1963). In *Henry*, upon remand, the South Carolina Supreme Court reconsidered the case in light of the *Edwards* decision, found the decision not controlling, reaffirmed the convictions, and explained why, in its view, the *Edwards* case was distinguishable. The Supreme Court then granted a second petition for certiorari and reversed outright the judgment of the South Carolina Supreme Court in a *per curiam* opinion and explained the significance of its first remand order:

> The South Carolina Supreme Court correctly concluded that our earlier remand did not amount to a final determination on the merits. That order did, however, indicate that we found *Edwards* sufficiently analogous and, perhaps, decisive to compel re-examination of the case.

See also: *Powell v. Texas*, ____ U.S. ____, 109 S. Ct. 3146 (1989) (the Court granted a second petition for writ of certiorari and reversed the Texas Court in a *per curiam* opinion because the decision was inconsistent with the

Supreme Court decision referred to in its earlier remand order).

This Court would not likely grant certiorari, vacate an *en banc* decision of the Seventh Circuit and remand for further consideration in light of *Zinermon* for the purpose of having the Seventh Circuit merely reiterate its prior decision and characterize the *Zinermon* case as a mere articulation of a peculiar "factual circumstance" to which *Parratt* does not apply. 910 F.2d at 1402.

Nor is it likely that this Court granted certiorari in *Zinermon* for the purpose of resolving a conflict among the circuits concerning the scope of *Parratt* only to "hint" that a narrow application of the *Parratt* rule "may be the appropriate course." The Seventh Circuit admits that, before *Zinermon*, *Parratt* could have been interpreted either narrowly or broadly. The Seventh Circuit also acknowledges that *Zinermon* had taken cognizance of the split which had developed among the circuits over this issue and granted certiorari to resolve that conflict. *Easter House, supra*, 910 F.2d at 1400. The majority opinion states:

> The ultimate disposition of the *Parratt* issue in *Zinermon* hints that a 'narrow' application of the *Parratt* rule may be the appropriate course. *Id.*

From any fair reading of the majority opinion in *Zinermon*, it is readily apparent that this Court did more than "hint" at the resolution of the conflict among the circuits; the Court adopted a sound, but narrow interpretation of the scope of *Parratt*.

The Seventh Circuit's efforts to distort and limit the scope of the Supreme Court's holding in *Zinermon* are particularly troubling here because this Court has already vacated the Seventh Circuit's prior *en banc* decision and

has remanded the case for further consideration in light of that very case. This Court surely did not remand for further examination of the case in light of the principles in *Zinermon* only to have the Seventh Circuit reiterate its vacated opinion and adhere to an interpretation of *Parratt* which is inconsistent with *Zinermon*.

Regardless of whether certain judges in the Seventh Circuit disagree with the Court's decision in *Zinermon*, the Seventh Circuit is nonetheless bound to follow the Supreme Court's decisions. Even though one Seventh Circuit judge considers the Supreme Court's decisions in this area as "inconsistent" and as "a line of precedent already resembling the path of a drunken sailor." *Id.* at 1409 (Easterbrook, J., concurring), that does not give the Seventh Circuit the right to decide this case in a manner inconsistent with the clear dictates of *Zinermon*.

The dissent written by Judge Cudahy and joined in by Judge Cummings and now Judge Posner (Judge Posner had been a part of the majority in the first *en banc* decision and joined the dissent after the remand by this Court) correctly and incisively reviews the *Zinermon* decision and its implications to *Easter House*. Following *Zinermon*'s reasoning, the dissent expresses a sound and unassailable conclusion:

> "I had thought that the Supreme Court's decision in *Zinermon* would have resolved the dispute over the validity of Easter House's procedural due process claim. Instead, the majority has danced around *Zinermon*, disregarding the broad precedential impact of that case and merrily tripping down its own tortuous path toward what seems to me an obviously wrong conclusion. . . ."

Id. at 1413.

Before *Zinermon*, there was a legitimate dispute concerning the scope of *Parratt* and its progeny. That dispute had resulted in the conflict that existed among the circuits. It also resulted in a divided opinion at the Supreme Court in *Zinermon*. However, since this Court has now resolved the issue, the majority opinion must be followed by the circuit courts. Petitioner submits that even those justices who dissented in the *Zinermon* case would agree that the lower courts are bound by the majority's decision and rationale. Justice is not served by the kind of distortions of an applicable Supreme Court decision evident in the Seventh Circuit's *en banc* majority opinion in *Easter House*. Lower courts should not denigrate or unreasonably limit the scope of a Supreme Court decision, especially where this Court has already granted certiorari, vacated the prior opinion, and remanded the case for further consideration in light of a particular decision addressing the single issue upon which that case had been decided. The Seventh Circuit's decision is directly inconsistent with this Court's decision in *Zinermon* and should be corrected. For whatever reasons, the majority of the Seventh Circuit seems determined to reverse the judgment in *Easter House*, and it apparently is not going to be deterred by anything less than a direct order from this Court.

CONCLUSION

Petitioner respectfully requests that this Court grant its Petition for a Writ of Certiorari, reverse the *en banc* decision by the Seventh Circuit, and direct that the judgment

of the District Court on Count One in favor of Easter House be affirmed.

Respectfully submitted,

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